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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 708

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) and CARPENTERS' LOCAL 1849, &c.,
Petitioners,

v.

C. J. MONTAG & SONS, INC., HOLMAN ERECTION COMPANY, INC., CURTIS CONSTRUCTION CO., *et als.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,
Counsel for the Petitioners.

FRANCIS X. WARD,
WILLIAM A. McGOWAN,
101 Constitution Ave., N.W.,
Washington, D. C. 20001,

R. MAX ETTER,
706 Spokane & Eastern Bldg.,
Spokane, Wash. 99201,

Of Counsel.

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INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) and CARPENTERS' LOCAL 1849, &c., your petitioners, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cases on July 14, 1964.

OPINIONS BELOW

The memorandum opinion of the district court (MR 38-49)[1] is not reported. The opinion of the court below (Appendix A, *infra*, pp. A1-A13) is reported at 335 F. 2d 216.

JURISDICTION

The judgments of the court below (Appendix B(1), *infra*, p. A14) were entered on July 14, 1964. A timely petition for rehearing in banc was denied on August 31, 1964 (Appendix B(2), *infra*, p. A15). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether work stoppages arising out of a demand by a union that an employer assign to its members particular work already assigned to members of another union will support a judgment for damages under §§ 303(a)(4) and (b) of the Labor Management relations Act, 1947, in respect of any period after the two unions were no longer competing for the particular work but had agreed that it should be reassigned to members of the first union.

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[1] The record as transmitted here consists of twelve volumes plus exhibits. The first volume contains the consolidated proceedings in the court below. The second has the pleadings and other court papers in the case brought by C. J. Montag & Sons, Inc., and its joint venturers, No. 1274 in the district court and No. 18875 below; it will be cited as "MR". The third, containing the pleadings, etc., in the case brought by Holman Erection Company, Inc., No. 1279 in the district court and No. 18876 below, will be cited as "HR"; while the fourth, with the pleadings, etc., in the Curtis Construction Co. case, No. 1288 in the district court and No. 18877 below, will similarly be cited as "CR".

The remaining eight volumes contain 1211 pages of transcript, numbered consecutively; they will be cited simply as "Tr."

The only exhibits relevant to the issues raised by this petition are those in the Montag case, and all exhibit references herein are accordingly restricted to those introduced in that proceeding.

2. Whether, where a union's contentions regarding assignment of work as between its members and those of another union are submitted at the employer's request to arbitration binding on all parties, pursuant to the first union's contract with the employer, the employer's refusal to comply with the arbitrators' award does not constitute a breach of contract because a United States Court of Appeals would have made a different award had it been arbitrating the dispute, or because that court would have set aside the award had it been made by the National Labor Relations Board in a proceeding under Section 10(k) of the National Labor Relations Act.

STATUTES INVOLVED

The statutes involved are set forth in Appendix C, *infra*, pp. A16-A19.

STATEMENT

These were three actions brought under §§ 303(a)(4) and 303(b) of the Labor Management Relations Act, 1947 (*infra*, pp. A18-A19), severally seeking damages by reason of an alleged jurisdictional strike; they were tried together in the district court, and were argued and decided together in the court of appeals.

The first one was brought by C. J. Montag & Sons, Inc., and three of its joint venture corporate associates (all hereinafter collectively referred to as "Montag"), against the International Brotherhood of Carpenters and Joiners of America, and Local 1849 of the same union (hereinafter "International" and "Local 1849" respectively, or collectively, "the Carpenters").[2] The defendants counter-

[2] Washington State Council of Carpenters and Columbia River Valley District Council of Carpenters, also made defendants originally, were dismissed from this action and from the two others without prejudice (MR 27, ¶2; HR 16, ¶2; CR 18, ¶2).

claimed under § 301(a) of the Labor Management Relations Act, 1947 (*infra*, p. A18), asserting a breach of contract on Montag's part. The district court found that Montag was damaged in the amount of $204,527.55 in consequence of the work stoppages (Fdg. 5, MR 70-71), held that Montag's breach of contract entitled the Carpenters to $40,000 by way of mitigation of damages (Conc. 2, MR 71, 82-83), and entered judgment in Montag's favor for the difference, viz., $164,527.55 (Conc. 3, MR 71-72; MR 73-74).

The second and third actions, brought by two of Montag's subcontractors, Holman Erection Company, Inc., and Curtis Construction Co. (hereinafter "Holman" and "Curtis," respectively), did not involve any counterclaims; they resulted in judgments in the respective sums of $10,000 (HR 38-39) and $42,877.92 (CR 46-47).

On cross-appeals by the Carpenters and Montag, the court below disallowed the $40,000 set-off in the Carpenters' favor, and in all other respects affirmed the judgments against the Carpenters.

The details of the case, insofar as they bear on the issues now presented, follow.

A. The Basic Dispute Between the Parties, and the Work Stoppages Resulting Therefrom.

In 1957, Montag as principal contractor and Holman and Curtis as subcontractors were engaged in constructing for the United States the Ice Harbor Dam on the Snake River near Pasco, Washington. Local 1849 had a collective bargaining agreement with Montag covering the carpenter work [Ex. 1], and other unions had similar contracts in respect of their trades. (Appendix A, *infra*, pp. A2-A3.)

Shortly after the commencement of work on the project in January 1957, there began a continuing controversy between Montag and Local 1849 as to whether and to what

extent the "rigging" of certain forms which were to be used in the pouring of concrete on the dam should be done by carpenters or by members of other craft unions (p. A3, *infra*). It is agreed that at no time material to the controversy was there ever an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing "rigging" work on the Ice Harbor Dam Project (Fdg 6, MR 57, HR 25, CR 27).

To quote from the opinion below (p. A3, *infra*), "some of the forms on the project were metal and some were wood. They were fabricated at certain locations on the project, carried to places where cranes were placed, and then were lifted by the cranes to the places where they were to be set up and used to contain the concrete as it was poured. The process of 'rigging' was the 'hooking on' of the fabricated forms to the cranes, the signaling to the operator of the crane that the forms were safely attached and, at the place where the crane was to deposit the forms, the unhooking of the forms from the crane and the signaling to the crane operator that that had been done. Both metal and wooden pieces of forms as well as other materials and tools might be attached to the same load."

In April 1957, Montag assigned the work of rigging the forms to the members of Iron Workers Local 14, in consequence of replies to inquires addressed by Montag to contractors at other major dam projects in the Pacific Northwest. Such inquiries were made on Montag's construction of the "procedural rules and regulations of the National Joint Board for Settlement of Jurisdictional Disputes, Building and Construction Industry [Ex. 3]." (Fdgs. 8 and 9, MR 57-58, HR 25-26, CR 27-28.)

The Carpenters urged that the rigging work belonged to them under the collective bargaining agreement covering Eastern Washinton and Northern Idaho to which Montag and the Carpenters were parties [Ex. 1]; that the same

"procedural rules and regulations of the National Joint Board" called for the area practice [Ex. 3, p. 4, ¶(b)]; and that the area practice in this instance was for the rigging of forms to be handled by members of the Carpenters (Fdg. 9, MR 58, HR 26, CR 27-28).

Once more to quote from the opinion below (*infra*, p. A4), "• • • Montag having refused to accede to this demand, Local 1849 caused its members to refuse to work on or handle wooden forms after they had been rigged by the iron workers. This refusal, which began on June 6, 1957, closed down the project, since concrete could not be poured unless forms were placed to contain it. Several hundred carpenters struck, and other workmen on the project were rendered idle. The purpose of the strike was to compel Montag to assign to the carpenters the rigging of the wooden forms. This strike continued until June 22. Montag did not change the assignment of the rigging work.

"Again on September 19, 1957, Local 1849 caused a stoppage of the project for the same purpose. The stoppage continued until September 26, but did not achieve its objective."

B. Settlement of the Dispute; Failure of Montag to Comply With the Arbitration Award.

The district court made no findings of fact regarding what on petitioners' view is a vital issue herein, viz., whether and for how long there was in fact an active dispute between the Carpenters and the Iron Workers. What follows below is drawn from the record.

Montag "had bid the job based on rigging the job by the use of Iron Workers" (Tr. 151), and disregarded the Carpenters' submission of letters from over 50 contractors establishing that the area practice was to assign all of that work to the Carpenters (Tr. 29, 50-51).

After the June stoppage started, international representatives of both unions went to the site, conferred, and reached an agreement on June 20, under which the Iron Workers relinquished their claims to at least a substantial portion of the work in question (Ex. 5 (Hiller), p. 34; Ex. 7 (Holland), pp. 23-24, 32; Ex. 8 (Pickel), 14; Ex. 11, p. 29; Ex. 38). The evidence indicates that the Iron Workers conceded to the Carpenters (Ex. 7, p. 29-30; Ex. 9 (Mitchell), p. 15; Ex. 35), but is in conflict as to whether that concession covered every issue in dispute (Ex. 5, pp. 34-35; Ex. 7, p. 28; Ex. 8, p. 14; Tr. 117). In any event, Montag refused to put the agreement into effect (Ex. 7, pp. 29-30), in part because it had bid on the job based on rigging being done by the Iron Workers (Tr. 151), in part on the ground that the agreement (Ex. 38) was not signed by the international presidents of the two unions (Tr. 94).

Agreement at the higher level was reached late in August (Ex. 5, pp. 40-41); to no avail; the contractor refused to comply (Ex. 5, pp. 36-39, 55; Ex. 7, pp. 33-35, 38-40; Tr. 148-151, 155-156); and it was this non-compliance with the August agreement that was directly responsible for the second or September stoppage (*infra*, pp. A7, A10), which was halted by the intervention of the Carpenters' General President (*ibid.*).

Montag then filed a protest with the National Joint Board for the Settlement of Jurisdictional Disputes (p. A7, *infra*), pursuant to the terms of its collective bargaining agreement with the Carpenters that specifically provided that "In the event of conflicting jurisdictional claims, the procedure of [that body, hereinafter "Joint Board"] shall govern" (*infra*, p. A10; Ex. 1 p. 12, Art. X § 2).

The Joint Board had been jointly established in May 1948 by labor and management in the construction industry to resolve and adjust jurisdictional disputes (Ex.

9, p. 4). It is composed of eight voting members, four representing building unions and four representing construction management (Ex. 9, pp. 17-18), and it deals not only with disputes in which the employer is neutral, but also with those in which the employer has made a work assignment that he seeks to have upheld (Ex. 9, p. 9).

On November 27, the Joint Board, duly including 4 management representatives (Ex. 9, p. 24; cf. *id.*, p. 17), made the following decision (*infra*, p. A10):

> "The hooking on, handling and signalling of all wood forms shall be assigned to carpenters. In other respects there is no basis to change the contractor's assignment. However, when not working on hooking on, handling and signalling operations the trade shall proceed with other work as assigned by contractor."

At the time that the foregoing decision was rendered, Montag had assigned to the Iron Workers all rigging work on multipurpose cranes, including the rigging of wooden forms; it refused to put the Board decision into effect; and it never did make any change in its work assignment (Fdg. 15, MR 59), even though two management members of the Joint Board, who "had been on the job and had viewed the physical thing and explained in some detail how the work was being handled * * * stated they believed that compliance could be effected with the Board's decission" (Ex. 9, p. 56).

Montag's continued refusal was the basis for the Carpenters' counterclaim under § 301(a) (*infra*, p. A18), which alleged breach of contract on Montag's part (MR 11-14) The portion of the Carpenters' contract with Montag making the procedure of the Joint Board applicable has already been quoted, *supra*, page 7; that procedure in turn provided (Ex. 3, p. 12) that "The affected Unions and Contractors shall promptly comply with each job decision of the Joint Board." It is common ground between the

parties that the Iron Workers equally with the Carpenters were bound by Joint Board decisions.

The district court concluded that Montag's failure to put the National Joint Board's decision into effect constituted a breach of the collective bargaining agreement to which Montag and the Carpenters were parties (Conc. 1, MR 71), but held that such breach entitled the Carpenters only to nominal damages, adding however that "it is equitable that [Montag's] damages should be reduced by the sum of $40,000 as mitigation or offset because of said breach of contract" (Conc. 2, MR 71). Following motions by both sides for amendments and additions, etc. (MR. 75-81), the district court amended the last quoted conclusion to read (MR 82-83):

> "Viewing [the Carpenters'] cross-complaint as an independent cause of action, [they] are not entitled to recover other than nominal damages from [Montag] as a result of said breach. However, considering the nature of this litigation and all of the surrounding circumstances of this case and the equities of the situation, it is proper that [Montag's] damages should be reduced by the sum of $40,000.00, which I find to be a reasonable amount in mitigation of damages."

The Carpenters appealed from all three judgments against them (MR 84; HR 40; CR 54), while Montag cross-appealed (MR 85-86), challenging both the basic measure of damages awarded as well as the foregoing set-off.

C. The Ruling Below.

The court of appeals sustained the judgments in favor of the several contractor plaintiffs in the amounts rendered, but reversed the set-off against Montag. Its holdings insofar as relevant to the questions presented by this petition may be summarized as follows:

1. The court did not pass on the contentions of the Carpenters that § 303(a)(4) (*infra*, pp. A18-A19) was

intended only to apply to such jurisdictional disputes as involved an active controversy between two unions, nor on Montag's view that it must be read literally. Instead, it supported Montag's alternative argument that in this case there was in fact an active dispute between the Carpenters and the Iron Workers (*infra*, pp. A4-A6), saying (pp. A8-A9):

> "The fact that one union has the jobs and holds on to them in a polite, non-belligerent manner while the other union uses the forbidden tactics in an effort to get them, or get some of them, does not mean that what Congress regarded as the evils of a jurisdictional dispute are not present. And the fact that the union which has the job is not unwilling that the other union should come in and do some of the work and get paid for doing it, if the first union will still continue to get paid for the work, does not remove the situation from the category of jurisdictional disputes."

2. As to the counterclaim of the Carpenters based on Montag's refusal to comply with the decision of the National Joint Board, the court below said (*infra*, p. A11) that "its decision is beyond understanding" on the ground that it involved featherbedding. The court went on to say that if the case had gone to the National Labor Relations Board in a proceeding under Section 10(k) (*infra*, pp. A17-A18), and the Labor Board "had made a decision such as the Joint Board made in the case," it would have been the duty of the reviewing court to remand the matter to the Labor Board under the ruling in *Labor Board* v. *Radio Engineers*, 364 U.S. 573.

The court below further said (*infra*, p. A12) that "We think that a fair interpretation of the agreement of the Carpenters and the contractors, in the light of its undoubted purpose, was that the Joint Board was authorized to *decide* the jurisdictional dispute, and was not authorized to straddle it and leave the whole purpose of the agree-

ment unfulfilled," and accordingly concluded that Montag did not breach its agreement with the Carpenters. It therefore held the $40,000 reduction erroneous, and remanded the case for further proceedings (*infra*, p. A13), proceedings that are in fact purely ministerial and require only changes in the amount of damages recoverable under the Montag and Holman judgments.

REASONS FOR GRANTING THE WRIT

This case involves a ruling doubly weighted against the petitioner labor organizations. First, the court below held the Carpenters liable for damages in respect of those portions of their work stoppage that were occasioned by Montag's refusal to effectuate their agreement with the Iron Workers over the assignment of the "rigging" work. Simultaneously, the court below held that when Montag invoked the Joint Board's arbitration to which it had bound itself in advance by solemn contract, but then refused to comply with the Joint Board's decision, it was nonetheless not guilty of a breach of contract.

Not only does the unfairness of this combined result recall the most indefensible labor decisions of the Nineteen Twenties (e.g., *Duplex Printing Co.* v. *Deering*, 254 U.S. 443; *Bedford Cut Stone Co.* v. *Stone Cutters Ass'n*, 274 U.S. 37), but the court below, by applying a standard for judging jurisdictional strikes at variance with that consistently formulated by the National Labor Relations Board, and by injecting its own concepts into the Joint Board's arbitral award in disregard of this Court's ruling in *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, that the merits of an arbitration award under a collective bargaining agreement are not subject to judicial revision, has in respect of both conflicts rendered a decision that literally cries out for review and correction here.

First. This case is not one where the employer concerned was (*infra*, p. A4) "the helpless victim over whose

prostrate body the battle was being fought;" to the contrary, Montag here was never neutral, and indeed stubbornly insisted on never altering the work assignment for the "rigging" that underlay its bid on the job (Tr. 151), even long after both unions concerned had arrived at an agreement govering the assignment of that originally disputed work.

In holding that, on such a state of facts, the employer could recover damages under § 303(a)(4) (*infra*, pp. A18-A19) for the period after both unions concerned had reached agreement, the court below clearly erred; for a consistent line of Labor Board rulings, all of them rendered subsequent to this Court's decision in *Labor Board* v. *Radio Engineers*, 364 U.S. 573, holds that there is no jurisdictional dispute within the meaning of § 8(b)(4)(D) and § 10(k) (*infra*, pp. A16-A17, A17-A18) in the absence of conflicting claims between competing unions. *Typographical Union*, 145 NLRB No. 95, 55 LRRM 1079; *Wood, Wire & Metal Lathers Int'l Union, Local 328*, 139 NLRB 598; *Sheet Metal Workers Int'l Assn., Local 272*, 136 NLRB 1402 (rival locals of same union); *Brotherhood of Teamsters, etc., Local 70*, 136 NLRB 1086 (same); *Highway Truckdrivers & Helpers, Local 107*, 134 NLRB 1320; *International Brotherhood of Electrical Workers, Local 292*, 126 NLRB 1212. Under those rulings, the circumstances relied on by the court below (*infra*, p. A6)—"The Iron Workers, therefore, had no occasion to complain or to strike about the assignment. They had the jobs"—is quite immaterial. What is alone material under the Labor Board's test is that, once the Iron Workers conceded to the Carpenters, there was no further jurisdictional strike.

It is true, as we have pointed out (*supra*, pp. 6-7), that the evidence regarding the extent of the Iron Workers' original concession is in conflict, nor was it resolved by any finding made by the trier of facts. But it is quite undis-

puted that, by end of August, the Iron Workers had made full concession at the highest level. And it is further undisputed that the September stoppage was a consequence, not of any quarrel between the Carpenters and the Iron Workers, because all disagreement among those two had been resolved, but only of a dispute between the Carpenters and Montag based on the circumstance that the latter obdurately refused to effectuate the agreement reached by the Carpenters and the Iron Workers.

The language of § 8(b)(4)(D) as it stood in 1957 when the stoppages now in question took place (*infra*, p. A16) is repeated verbatim in what at that time was § 303(a)(4) (*infra*, pp. A18-A19); surely, then, conduct that is legally insufficient to sustain before the Labor Board a charge of unfair practices under § 8(b)(4)(D) cannot support an action for damages under § 303(a)(4). This conclusion, that the substantive meaning of §§ 8(b)(4)(D) and 303 (a)(4) was the same, is strengthened by the "cross light" thrown on the problem by the later 1959 amendments (L. Hand, J., in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429 (C.A. 2); cf. *Cammarano* v. *United States*, 358 U.S. 498, 510), whereby § 303(a) (*infra*, p. A19) now simply incorporates § 8(b)(4) by reference.

Of course the remedies severally available under § 8(b) (4)(D), under § 10(k), and under § 303(a)(4) are not mutually exclusive (*International Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237), nor need there be "substantive symmetry" between the several approaches to the same jurisdictional strike problem (*Labor Board* v. *Radio Engineers*, 364 U.S. 573, 585). But surely, regardless of what remedy is invoked, the nature of the conduct that Congress has proscribed remains identical. There are three remedies—but the conduct at which all of them are directed, and which Congress has declared illegal, must be the same whatever the remedy invoked.

The conclusion reached below, that the Carpenters were guilty of improper conduct, rests on a standard wholly different from that consistently formulated by the Labor Board in identical situations. The problem is a recurring one, and it is obviously important that this Court lay down a uniform rule for ascertaining the propriety or impropriety of particular union action.

Second. Not content merely with differing with the Labor Board on a matter still to be decided here, the court below went on to disagree with this Court on another issue. As we have shown, Montag invoked the arbitral machinery of the Joint Board's procedure, but then refused ever to comply with that body's award although bound to do so by the terms of its collective bargaining agreement with the Carpenters. Yet the court below refused to deem such noncompliance with the Joint Board's decision a breach of contract on Montag's part for which it would be liable in damages under § 301(a) (*infra*, p. A18), because, forsooth, the court below considered (*infra*, p. A11) that the Joint Board's decision "is beyond understanding."

On that phase of the case, the court below quite brushed aside what this Court had held in *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 596:

> "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. * * * the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements."

Significantly enough, the Joint Board award that the court below deemed "beyond understanding" (*infra*, p. A11) was one that two management members of the Joint

Board considered entirely feasible after they had personally visited the job site (Ex. 9, p. 56).

Whether a similar award made by the Labor Board in a Section 10(k) proceeding would have been unenforceable, as the court below intimated it would be (*infra*, p. A11), is of course quite irrelevant. The Section 10(k) remedy was adopted in preference to arbitration, see *Labor Board* v. *Radio Engineers*, 364 U.S. at 581-583; and, as the Chairman of the Joint Board testified (Ex. 9, pp. 6-7), the Labor Board's function under Section 10(k) is wholly different from that of the Joint Board under the collective bargaining agreements that provide for resort to its procedures.

Here the court below has pushed into view the asserted wrongs committed by the Carpenters while pushing out of view the palpable breach of contract committed by Montag. And, since that obviously unfair result was reached by substituting the court's judgment for that of the arbitrators selected by the parties, there is involved a disregard of this Court's decision in *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593. Review is therefore imperative to redress the resultant divergence.

Third. The court below seems to have been mesmerized by the word "featherbedding," using it no less than six times apart from quotations (*infra*, pp. A6, A7 (twice), A8, A11 (twice)). But even if effectuating the Joint Board's award had required Montag to fill a few more jobs, a matter that rests on purest speculation inasmuch as Montag never even attempted compliance therewith, that circumstances would not constiute an unfair labor practice under § 8(b)(6) (*infra*, pp. A16, A17) as that provision has been construed here. *American Newspaper Publishers Ass'n* v. *Labor Board*, 345 U.S. 100; *Labor Board* v. *Gamble Enterprises*, 345 U.S. 117. Moreover, even full blown featherbedding clearly in violation of § 8(b)(6) would not support an action for damages under § 303(b); both the

acts enumerated under § 303(a)(4) as originally enacted (*infra*, p. A16) as well as those incorporated by reference in § 303(a) as later amended (*infra*, p. A19) do not include any of the matters condemned as unfair labor practices by § 8(b)(6).

In consequence of its preoccupation with the word "featherbedding" and of its use of that term as though the expression itself exuded self-generated evil, the court below has rendered what can only be deemed a decision by epithet. But that circumstance, though it probably explains the disregard below of controlling rulings here, falls far short of justifying, much less of supporting, the judgments now sought to be reviewed.

CONCLUSION

All three judgments below rest on a theory of law that would not support a finding of unfair labor practices by the Labor Board, while the judgment in the Montag case is additionally in square conflict with decisions here. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,
Counsel for the Petitioners.

FRANCIS X. WARD,
WILLIAM A. MCGOWAN,
101 Constitution Ave., N.W.,
Washington, D. C. 20001,

R. MAX ETTER,
706 Spokane & Eastern Bldg.,
Spokane, Wash. 99201,

Of Counsel.

NOVEMBER 1964.

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) and CARPENTERS' LOCAL 1849, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
Appellants,

vs.

C. J. MONTAG & SONS, INC., a corporation, et al.,
Appellees.

C. J. MONTAG & SONS, INC., a corporation, CARL M. HALVORSON, INC., a corporation, AUSTIN CONSTRUCTION CO., a corporation, BABLER BROS., INC., a corporation, and McLAUGHLIN, INC., a corporation,
Appellants,

vs.

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, et al.,
Appellees.

No. 18,875

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) and CARPENTERS' LOCAL 1849, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
Appellants,

vs.

HOLMAN ERECTION COMPANY, INC., a corporation,
Appellee.

No. 18,876

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) and CARPENTERS' LOCAL 1849, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
Appellants,

vs.

CURTIS CONSTRUCTION CO., a corporation,
Appellee.

No. 18,877

[July 14, 1964]

On Appeal from the United States District Court for the Eastern District of Washington, Southern Division

Before: HAMLEY, Circuit Judge; MADDEN, Judge of the United States Court of Claims; and JERTBERG, Circuit Judge.

MADDEN, Judge:

These three appeals, which will be treated in one opinion, are from judgments rendered against the appellants by the United States District Court for the Eastern District of Washington, Southern Division. The appellants are the International Brotherhood of Carpenters and Joiners of America (AFL-CIO), and Carpenters Local 1849, located at Pasco, Washington, of the same union. They will be referred to hereinafter as "International" and "Local 1849" or, collectively, as the Carpenters. The suits against the two labor organizations, in which suits the judgments appealed from were rendered, were suits based upon § 303(a)(4) and (b) of the National Labor Relations Act of 1947 (Taft-Hartley Act), 29 U.S. Code § 187(a)(4) and (b). That statute said, *inter alia*, that it is unlawful for a labor organization to engage in a strike the object of which is:

> forcing or requiring any employer to assign particular work to employees in a particular organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for the employees performing such work.

The section says, in paragraph (b), that anyone injured in his business or property by a violation of the foregoing provision may sue therefor in any district court of the

United States and may recover the damages by him sustained.

In the year 1957 the appellees in No. 18,875, the Montag company and three other companies as joint venture contractors, were engaged in the construction for the United States of a dam on the Snake River near Pasco, Washington. The joint venturers as a group are hereinafter called "Montag." The project involved the use of materials worth some $17,000,000. It was called the Ice Harbor Dam project. The appellees in Nos. 18,876 and 18,877 were sub-contractors of Montag on the project. Local 1849 had a collective bargaining contract with Montag with regard to the carpenter work on the project. Other unions had similar contracts with regard to their respective trades. Not long after the commencement of work on the project in January, 1957, there began a continuing controversy between Montag and Local 1849 as to whether, and to what extent, the "rigging" of certain forms which were to be used in the pouring of concrete on the dam should be done by carpenters or by workmen of another craft.

It seems that some of the forms on the project were metal and some were wood. They were fabricated at certain locations on the project, carried to places where cranes were placed, and then were lifted by the cranes to the places where they were to be set up and used to contain the concrete as it was poured. The process of "rigging" was the "hooking on" of the fabricated forms to the cranes, the signaling to the operator of the crane that the forms were safely attached and, at the place where the crane was to deposit the forms, the unhooking of the forms from the crane and the signaling to the crane operator that that had been done. Both metal and wooden pieces of forms as well as other materials and tools might be attached to the same load. As early as April, 1957, Montag had assigned the work of rigging the forms to the members of Iron Workers Local 14. Local 1849 having urged that its members should

have the work of rigging the wooden forms, and Montag having refused to accede to this demand, Local 1849 caused its members to refuse to work on or handle wooden forms after they had been rigged by the iron workers. This refusal, which began on June 6, 1957, closed down the project, since concrete could not be poured unless forms were placed to contain it. Several hundred carpenters struck, and the other workmen on the project were rendered idle. The purpose of the strike was to compel Montag to assign to the carpenters the rigging of the wooden forms. This strike continued until June 22. Montag did not change the assignment of the rigging work.

Again on September 19, 1957, Local 1849 caused a stoppage of the project for the same purpose. The stoppage continued until September 26, but did not achieve its objective. The two stoppages of this large project caused substantial damages to the contractors, and the instant suits were brought to recover those damages.

We have quoted hereinabove, the pertinent language of § 303 of the statute. The events which we have recited seem to fit the quoted language and to support the judgment of the District Court. The appellants urge that the statute must not be read literally, that it was intended to apply only to such jurisdictional disputes as involved an active controversy between two unions, the employer being the helpless victim over whose prostrate business the battle was being fought. The appellants say that in this case there was no active controversy between the Carpenters and the Iron Workers; that the Carpenters were merely making a lawful demand upon Montag, and using lawful economic force to obtain what they demanded.

Montag and the other appellees reply that the statute may not be read as if it contained a requirement that there be an active dispute between two unions but that, if the statute must be so read, the requirement is fulfilled by the facts of this case. We agree with the appellees' alternative

contention that there was in fact an active dispute between two unions, and therefore find it unnecessary to explore their argument for a literal reading of the statute. This case does not resemble at all the case of Penello v. Sheet Metal Workers Union, 195 F. Supp. 458 (D.C. Del.) upon the excellent opinion in which the appellants rely heavily.

We here take note of the Supreme Court's recognition that the draftsmen of the Taft-Hartley Act regarded jurisdictional disputes as a great evil and were bent upon doing all that could be done to cure that evil. In the 1961 case of N.L.R.B. v. Radio and Television Broadcasting Eng. Union, 364 U.S. 573, the Court was dealing with the administrative provision of the Act, not here involved. Section 8(b)(4)(D), 29 U.S. Code § 158(b)(4)(D), defines as an unfair labor practice the same conduct proscribed as unlawful and as a basis for a suit for damages by § 303, and § 10(k) of the Act, 29 U.S. Code § 160(k), provides that when a charge is made that a jurisdictional dispute is being carried on, the National Labor Relations Board

> is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen

unless, within ten days after the filing of the charge, the dispute is settled, or an agreement for its settlement has been made by the parties. The Supreme Court held that the Board was obliged to decide that one of the disputants should get the work, even though Congress had given the Board no guide lines whatsoever to be followed in making its decision. This recognition by the Supreme Court that the mood of Congress was that jurisdictional disputes are intolerable is significant, and teaches us that the damage suit provisions which Congress inserted in the law at the same time that it wrote the above cited provisions for an administrative remedy should not be given a narrow interpretation.

It is pertinent here to note that in the District Court the Carpenters urged that their contract with Montag entitled them to the work here in question, and that the statute should not be so interpreted as to make it unlawful to strike to enforce a contract right. The District Court assumed, without deciding, that Montag did breach the contract but that its breach was not a justification for the Carpenters' strike to enforce the contract. We think that it is not necessary to decide that question. The contract on which the Carpenters rely was, at best, vague and uncertain on the point, and subject, to say the least, to a bona fide dispute by Montag. To hold that in such a situation the statutes outlawing jurisdictional disputes are inapplicable would, to a substantial degree, frustrate the purpose of the statutes. It is to be noted that in this appeal the appellants do not pursue this contention.

We now consider whether there was a jurisdictional dispute between the Carpenters and the Iron Workers for the work of rigging the wooden forms. As we have seen, Montag, as early as April, 1957, assigned the work to the Iron Workers. It persisted in that assignment throughout the two year period of performance of the contract. The Iron Workers, therefore, had no occasion to complain or to strike about the assignment. They had the jobs. Their national union and the Carpenters' union both being members of the AFL-CIO federation, it was natural that their national officers should engage in friendly discussion with the national officers of the Carpenters. All responsible union officials are aware that jurisdictional disputes and featherbedding are in bad repute, and they try to avoid putting friendly allied unions in the position of engaging in these tactics.

During the discussion before the June stoppage, the Iron Workers were asserting their right to keep the work which had been assigned to them. When the stoppage occurred,

both unions sent international representatives to the job site to adjust the dispute. On June 20 an agreement was made between the unions and the contractors, under which the men were to return to work and any subsequent jurisdictional disputes were to be settled without work stoppages. Certain additional work was given to the Carpenters. Late in August the representatives of the two unions sought to put into effect a tentative agreement reached by their presidents. This agreement provided that the Carpenters would handle the wood forms and the Iron workers would handle everything else. Since the Iron Workers would not agree to composite crews, this would have required duplicate crews for the cranes which were handling both wood and metal forms. Montag refused to put this union agreement into effect and filed a protest with the "Joint Board." The Joint Board was made up of representatives of unions and contractors. Its full name was National Joint Board for the Settlement of Jurisdictional Disputes.

Because of Montag's refusal to put the agreement of the two unions into effect, the September work stoppage occurred. During the stoppage the competing unions recognized that the agreement could not, as written, be put into effect without featherbedding, and directed their representatives to work out an equitable solution. Before such a meeting was held the Carpenters were directed by their International president to return to work. The meeting was held on September 26, but the dispute was not solved because no way could be found to give additional work to the Carpenters without featherbedding the job. The subject was dropped and the work went on as before.

Montag sent sent a telegram to the national office of the Association of General Contractors saying that the only agreement which could be reached would require the appellees to use duplicate crews on the multipurpose cranes when rigging wood forms. This telegram resulted in a

further exchange of communications and a telegram from the Joint Board on October 3, 1957, saying:

> This office has been assured by Iron Workers and Carpenters Internationals that it is not their intent to use duplicate crews on any rig.

The Joint Board on November 27 issued its decision approving a division of a single work assignment but requiring that this be done in a manner which would not require duplicate crews. The decision also said:

> However, when not working on hooking-on, handling and signalling operations, the trades shall proceed with other work as assigned by the contractor.

The chairman of the Joint Board testified in the Montag case that the sentence just quoted was the Board's precaution against featherbedding. When the Joint Board's decision was not put into effect, it, on December 31, 1957, sent a telegram to the parties saying:

> Both unions were instructed to assist contractors in executing work performance to eliminate any accusation of featherbedding. Cooperation is still necessary between contractor and unions involved.

The Joint Board's decision was never put into effect. In a later part of this opinion we shall have occasion to refer to it again.

The foregoing narration of events giving rise to these suits seems to us to portray a typical case easily within the purpose of the Taft-Hartley Act's provisions concerning jurisdictional disputes. The fact that one union has the jobs and holds on to them in a polite, non-belligerent manner while the other union uses the forbidden tactics in an effort to get them, or get some of them, does not mean that what Congress regarded as the evils of a jurisdictional dispute are not present. And the fact that the union which has the job is not unwilling that the other union should come in and do some of the work and get

paid for doing it, if the first union will still continue to get paid for the work, does not remove the situation from the category of jurisdictional disputes.

On this phase of the case our conclusion is that the District Court was right in finding that Carpenters Local 1849 had violated §303(a)(4), 29 U.S. Code 187(a)(4) and in giving the appellees in case No. 18,875 a judgment for its damages. We also conclude that the International Brotherhood of Carpenters and Joiners of America is liable to the same extent as is Local 1849. The District Court so held, finding that the International participated in and encouraged Local 1849 in carrying out its unlawful activity. This finding is well supported by the evidence.

We approve the District Court's judgments in Nos. 18,876 and 18,377, except that the judgment in 18,876 should be for $10,000 rather than for "not less than $10,000." These companies were subcontractors on the main project, and were damaged by the stoppages caused by the appellants.

As to the judgment in favor of Montag, No. 18,875, the appellants object to various items of damages which enter into that judgment. The appellees in that case have appealed from the court's omission from the judgment of various items claimed in their petition, and from the substantial reductions in the amounts of some items. We have considered the contentions of both parties, and approve the action of the trial court in its determination of the items and the amounts of Montag's damages. Reference will be made hereinafter to the court's reduction of the Montag judgment by the amount of $40,000 "as mitigation or offset because of a breach of contract by plaintiffs [Montag]."

Local 1849 and International each filed a cross-complaint in the Montag case asserting that Montag had refused and was still refusing to comply with the order of the Joint Board of November 27, 1957, and was thereby guilty of

a breach of a contract which it had made with the unions, which contract provided:

> In the event of conflicting jurisdictional claims, the procedure of the National Joint Board for Settlement of Jurisdictional Disputes shall govern.

Montag, through the Association of General Contractors, had in September of 1957, filed a protest with the Joint Board saying that the arrangements which the Carpenters were insisting upon could not be put into effect without duplicating the crews of riggers. The September stoppage occurred because of the refusal of Montag to accede to the Carpenters demands. The stoppage was terminated by a direction from the International president of the Carpenters that they go back to work. The Iron Workers continued to do the rigging. The Joint Board took the matter under consideration and representations were made to it by the parties. On October 3, 1957, the Joint Board responded to a communication from Associated General Contractors, and said:

> This office has been assured by Iron Workers and Carpenters Internationals that it is not their intent to use duplicate crews on any rig.

Montag replied that it did not see how the objective of giving Carpenters a part of the rigging work could be achieved without using composite crews, which the Iron Workers would not permit, or duplicate crews.

On November 27, 1957, the Joint Board issued the following decisions with regard to the dispute:

> The hooking on, handling and signalling of all wood forms shall be assigned to carpenters. In other respects there is no basis to change the contractor's assignment. However, when not working on hooking on, handling and signalling operations the trade shall proceed with other work as assigned by contractor.

The Chairman of the Joint Board testified in the instant case that, by the third sentence in the decision quoted just above, "the Board took precautions against featherbedding"; that the sentence was inserted "so that there could be no accusation of duplicating crews"; that "by that action any possible possibility of duplicate crews was eliminated."

With due deference to the tribulations of a board of arbitration such as the Joint Board, we think its decision is beyond understanding. Under the decision the crane would be manned by a crew of iron workers. Everything which was to go up, metal forms, tools, and whatever else, except pieces of wood forms, would be hooked on, handled, and signalled by the crew of iron workers. But if a piece of wood form was to go with the load, carpenters would have to be summoned, if they were not standing by while the iron workers were working. If no carpenters, or no carpenters skilled in safely attaching forms to the crane, or in signalling the handling of the crane were nearby, competent carpenters would have to be brought on. Then the iron workers would stand by while the carpenters did their work. This would be, obviously, *pro tanto* duplication of crews, and *pro tanto*, featherbedding. In the meantime the crew at the destination of the crane's load would be idle. How the signalling of the operation of the crane would be divided up we have no clear idea.

If this case had gone to the National Labor Relations Board for administrative handling under §10(k) of the Act, 29 U.S. Code §160(k), and the Board had made a decision such as the Joint Board made in the case, it would have been the duty of a reviewing court to send the case back to the Board with a direction that it should do its work. N.L.R.B. v. Radio and Television Eng. Union, 364 U.S. 573, mentioned supra herein. A jurisdictional dispute is not "determined" by attempting to muffle it by a decision which embodies the evils of duplication and featherbedding at the expense of the employer, which Congress sought to eliminate.

Montag did not put into effect the decision of the Joint Board. The District Court held that it thereby breached its contract with the Carpenters. Montag says that the Joint Board was not authorized by the agreement between Montag and the Carpenters to make the kind of decision which it made, a decision which did not resolve the jurisdictional dispute but merely gave to each of the disputing unions all that it was asking for and imposed upon Montag the entire cost of the duplication and waste which would have resulted. We think that a fair interpretation of the agreement of the Carpenters and the contractors, in the light of its undoubted purpose, was that the Joint Board was authorized to *decide* the jurisdictional dispute, and was not authorized to straddle it and leave the whole purpose of the agreement unfulfilled.

We conclude that Montag did not breach its agreement with the Carpenters, and that the Carpenters were not entitled to a judgment against Montag even, as the District Court held, for nominal damages. We therefore are not required to decide whether, if Montag had breached its contract with the Carpenters, Local 1849 should have been given a judgment for the amounts which its members allegedly lost in wages by reason of the breach. On that question, the cases of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437; Textile Workers v. Lincoln Mills, 353 U.S. 488; and Smith v. Evening News Assn., 371 U.S. 195, would have required consideration.*

One of the District Court's Conclusions of Law was as follows:

> Viewing defendants' cross-complaint as an independent cause of action, defendants are not entitled to recover other than nominal damages from plaintiffs as a result of said breach. However, consider-

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* See also this court's opinion in International Longshoremen and Warehousemen's Union v. Paul R. Kuntz et al., [334] F.2d [165], June 26, 1964.

> ing the nature of this litigation and all of the surrounding circumstances of this case and the equities of the situation, it is proper and equitable that the plaintiffs' damages should be reduced by the sum of $40,000, which I find to be a reasonable amount in mitigation of damages.

In another Conclusion of Law the court said:

> Defendants are not entitled to recover other than nominal damages from plaintiffs as a result of said breach. However, it is equitable that plaintiffs' damages should be reduced by the sum of $40,000, as mitigation or offset because of said breach of contract by plaintiffs.

The court had determined that the plaintiffs damages were $204,527.55. On the basis of the two conclusions of law quoted just above, it rendered judgment for the plaintiffs for $40,000 less than the amount of plaintiffs' damages, i.e., for $164,527.55. To whatever extent this reduction was related in the mind of the court to the plaintiffs' asserted breach of contract, our conclusion that the plaintiffs did not breach their contract removes that basis for the $40,000 reduction. The court, in the first of the Conclusions of Law quoted above, refers to "the equities of the situation." It does not enlighten us as to what equities it had in mind. We think the applicable statute, providing that the victim of a jurisdictional dispute should recover his damages, does not authorize a court to reduce the damages shown by the evidence, because of some unidentified equity. If the court regards the statute as harsh, it should remember that it is the function of Congress to determine whether the measure of damages should be strict or flexible. We hold that the $40,000 reduction embodied in the judgment was erroneous.

We affirm the judgment of the District Court in part, and reverse it in part, and remand the case to that court for further proceedings not inconsistent with this opinion.

APPENDIX B

(1) Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18,875

INTL. BRO. OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO etc., et al.; *Appellants-cross appellees.*

vs.

C. J. MONTAG & SONS, INC., etc., et al.
Appellees-cross appellants

Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington, Southern Division, and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part, and reversed in part, and that this cause be and hereby is remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Filed and entered July 14, 1964

[Note: Identical judgments were entered in No. 18,876 and in No. 18,877.]

(2) Order Denying Rehearing

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, August 31, 1964

Before: HAMLEY, Circuit Judge; MADDEN, Judge of the United States Court of Claims; and JERTBERG, Circuit Judge

ORDER DENYING PETITION FOR REHEARING AND REHEARING EN BANC

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellants filed August 19, 1964, and within time allowed therefor by rule of court, and valid extension thereof, for a rehearing and rehearing en banc of above cause be, and hereby is denied.

APPENDIX C

Statutes Involved

1. Sections 8(b)(4)(D) and 8(b)(6) of the National Labor Relations Act, as amended through 1951, 29 U.S.C. §§ 158(b)(4)(D) and (b)(6), provided in pertinent part as follows:

"§ 158. Unfair labor practices

* * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

* * * * *

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * * "

* * * * *

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

2. Sections 8(b)(4)(D) and 8(b)(6) of the National Labor Relations Act, as amended in 1959, 29 U.S.C. §§ 158 (b)(4)(D) and (b)(6), provide in pertinent part as follows:

"§ 158. Unfair labor practices

* * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * * "

* * * * *

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; * * * "

3. Section 10(k) of the National Labor Relations Act as amended, 29 U.S.C. § 160(k), provides as follows:

"§ 160. Prevention of unfair labor practices—(a) Powers of Board generally

* * * * *

"Hearings on jurisdictional strikes

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and

determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

4. Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. § 185(a), provides as follows:

"§ 185. Suits by and against labor organizations—Venue, amount, and citizenship

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

5. Section 303(a)(4) of the Labor Management Relations Act, 1947, 29 U.S.C. § 187(a)(4), originally provided in pertinent part as follows:

"§ 187. Boycotts and other unlawful combinations; right to sue; jurisdiction; limitations; damages

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

* * * * *

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor or-

ganization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work."

6. Section 303(a) of the Labor Management Relations Act, 1947, as amended in 1959, 29 U.S.C. § 187(a), provides as follows:

"§ 187. Boycotts and other unlawful combinations; right to sue; jurisdiction; limitations; damages

"(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b) (4) of this title."

7. Section 303(b) of the Labor Management Relations Act, 1947, 29 U.S.C. § 187(b), provides as follows:

"(b) Whoever shall be injured in his business or property by reason *or* any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 708

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) and CARPENTERS' LOCAL 1849, &c., *Petitioners,*

v.

C. J. MONTAG & SONS, INC., HOLMAN ERECTION COMPANY, INC., CURTIS CONSTRUCTION CO., *et al.* *Respondents.*

BRIEF OF RESPONDENT CURTIS CONSTRUCTION CO. OPPOSING ISSUANCE OF WRIT OF CERTIORARI

SMITHMOORE P. MYERS
East 502 Boone Avenue
Spokane, Washington 99202
Counsel for Respondent Curtis Construction Co.

HART SNYDER
711 Old National Bank Building
Spokane, Washington 99201
Of Counsel

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BRIEF OF RESPONDENT CURTIS CONSTRUCTION CO. OPPOSING ISSUANCE OF WRIT OF CERTIORARI

The respondent Curtis Construction Co. respectfully submits the following brief opposing certiorari.

QUESTION PRESENTED AS TO CURTIS

Petitioners propound two questions, the second of which (Petition, p. 3) concerns only their counter-

claim against the prime contractor, C. J. Montag & Sons, Inc., in Circuit Court of Appeals Case No. 18875, District Court No. 1274. They note at page 4 that no counterclaim is involved in the Curtis Construction matter, Circuit Court of Appeals No. 18877, District Court No. 1288. The remaining question, say petitioners, is:

> "Whether work stoppages arising out of a demand by a union that an employer assign to its members particular work already assigned to members of another union will support a judgment for damages under §§303(a)(4) and (b) of the Labor Management relations Act, 1947, in respect of any period after the two unions were no longer competing for the particular work but had agreed that it should be reassigned to members of the first union."

REASONS FOR NOT GRANTING THE WRIT

1. No conflict with another Court of Appeals is involved.

2. No important question of federal law has been decided requiring settlement by this court.

3. No federal question has been so decided as to conflict with applicable decisions of this court.

4. There has been no departure from the accepted and usual course of judicial proceedings, calling for the exercise of this court's supervision.

5. Reversal would require overturning a factual determination.

ARGUMENT

1. Petitioners cite no decision from another Circuit Court of Appeals supposed to conflict with the opinion and judgment herein. On the contrary, the Second and Eighth Circuits have held that no dispute between unions is required.

> *Vincent vs. Steamfitters' Local, etc.*, 288 F. 2d 276, 278 (CA 2, 1961)
>
> *Local 978, United Brotherhood of Carpenters, etc. vs. Markwell*, 305 F. 2d 38, 47 (CA 8, 1962)

It is not our understanding that Rule 19(b) of the Supreme Court rules extends to conflicts between a circuit court of appeals and an administrative board but nevertheless petitioners' case is based upon several National Labor Relations Board rulings, typical of which is the three-to-two decision in *Highway Truck Drivers & Helpers, Local 107*, 134 NLRB 1320. All arose under §8(b)(4)(d), of the Labor Management Relations Act, the substantive meaning of which petitioners assert, is the same as that of §303(a)(4), with which we are here concerned. This argument was destroyed in advance by *NLRB vs. Radio and Telev. Broadcast Engrs.*, 364 U. S. 573, where the Court recognized the separate and distinct nature of the two approaches to the problem, stating at page 585 that it did not "require a 'substantive symmetry' between the two" sections.

2. If petitioners' question be "important" under Rule 19(b), we think it has already been settled by this

court. In *International L. & W. U. vs. Juneau Spruce Corp.*, 342 U.S. 237, 245, it was noted that "(t)he fact that the union of mill employees temporarily acceded to the claim of the outside group did not withdraw the dispute from the category of jurisdictional disputes condemned by §303(a)(4)." We are concerned with no refusal by the Ironworkers to rig wooden forms in deference to the Carpenters' alleged rights. The Ironworkers seemed wholly content with the situation. It was the Carpenters who exercised "self-help" to enforce the supposed understanding, walking off the job because the work was assigned to others. We find no exception in §303(a)(4) of a strike to enforce an accord between unions which have divided up their common employer's work. Only a National Labor Relations Board order or certification will suffice.

3. Petitioners cite no "applicable decisions of this court" with which the opinion and judgments of the Ninth Circuit Court of Appeals are alleged to conflict insofar as they affect the respondent Curtis Construction Co. On the contrary, the Circuit Court determination seems entirely consistent with *Juneau Spruce* and *Radio & Telev. Broadcast Engrs., supra.*

4. Although petitioners complain of the Circuit Court's disposition of their counterclaim, they suggest no departure "from the accepted and usual course of judicial proceedings" as to Curtis Construction Co.

5. Seemingly, petitioners seek a review of the evidence to determine whether there was an "active dis-

pute" between the unions. In summarizing the Court of Appeals opinion, their petition states at page 9:

> "The court did not pass on the contentions of the Carpenters that §303(a)(4) . . . was intended only to apply to such jurisdictional disputes as involved an active controversy between two unions, nor on Montag's view that it must be read literally. Instead, *it supported Montag's alternative argument that* in this case *there was in fact an active dispute between the Carpenters and the Iron Workers* (our emphasis)."

Petitioners concede the evidence to be in conflict, at least in part (Petition, p. 12) and, in effect, ask this Court to reach a factual conclusion contrary to that of the Circuit Court of Appeals. But, as stated in the dissent to *Dick vs. New York Life Ins. Co.,* 359 U. S. 437, 454:

> "Questions of fact have traditionally been deemed to be the kind of questions which ought not to be recanvassed here unless they are entangled in the proper determination of constitutional or other important legal issues. In *Newell v. Norton* (US) 3 Wall 257, 18 L ed 271, Mr. Justice Grier stated the considerations weighing against Supreme Court review of factual determinations: 'It would be a very tedious as well as a very unprofitable task to again examine and compare the conflicting statements of the witnesses in this volume of depositions. And, even if we could make our opinion intelligible, the case could never be a precedent for any other case, or worth the trouble of understanding.' 3 Wall, at 267. And he issued this caveat: 'Parties ought not to expect this court to revise their decrees merely on a doubt raised in our minds as to the correctness of their judgment, on the credibility of witnesses, or the weight of conflicting testimony.' 3 Wall, at 268"

If the court should nevertheless choose to delve into this matter, it should be noted that the record is replete with statements by appellants' own people, acknowledging the existence of a "dispute" *between the unions,* extending from early April, 1957, until at least November, 1957 (Brown dep. Ex. 4, p. 6-8; Hiller dep., Ex. 5, p. 22, 28-29, 38-39, 40-41, 46-47; Tr. 31-32). Witnesses from the Ironworkers Union similarly recognized the existence of a "dispute" *between the two organizations* (Pickel dep., Ex. 8, p. 8-10, 12, 14-18; Holland dep., Ex. 7, p. 22-29, 46). Numerous references to the "dispute" *between the Carpenters and the Ironworkers* appear in the testimony of Richard James Mitchell, chairman of the National Joint Board for the Settlement of Jurisdictional Disputes (Mitchell dep., Ex. 9, p. 15-16, 21, 23, 28-29, 32, 42, 45-47).

CONCLUSION

In conclusion, therefore, respondent Curtis urges that its case falls squarely within the express language of §303(a)(4). The carpenters engaged in, induced and encouraged employees of C. J. Montag & Sons, Inc. to engage in a strike and a concerted refusal in the course of their employment to use, transport or handle goods, articles, materials and commodities or perform services, with the object of forcing and requiring Montag to assign the rigging of wooden forms to the carpenters, rather than to members of the Ironworkers Union. Curtis Construction Co., having been injured in its business and property by

reason thereof, properly recovered the damages sustained thereby (§303(b)).

Respectfully submitted,

SMITHMOORE P. MYERS
East 502 Boone Avenue
Spokane, Washington 99202
Counsel for Respondent Curtis Construction Co.

HART SNYDER
711 Old National Bank Building
Spokane, Washington 99201
Of Counsel

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In the Supreme Court
of the United States

OCTOBER TERM, 1964

No. 708

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) and CARPENTERS' LOCAL 1849, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Petitioners,

vs.

C. J. MONTAG & SONS, INC., CARL M. HALVORSON, INC., AUSTIN CONSTRUCTION CO., BABLER BROS., INC., and McLAUGHLIN, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MANLEY B. STRAYER,
1410 Yeon Building,
Portland, Oregon 97204,
Counsel for Respondents.

ROBERT H. HUNTINGTON,
CHARLES J. McMURCHIE,
1410 Yeon Building,
Portland, Oregon 97204
Of Counsel.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-64

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is filed on behalf of appellees-appellants in case No. 18875 below, hereinafter collectively called "respondents," in opposition to the petition for a writ of certiorari filed by petitioners, hereinafter sometimes referred to as "international union" and "Local 1849," respectively. References to the record filed here will be the

same as those used by petitioners; "MR" for references to the district court clerk's record containing the pleadings and other court papers, and "Tr." for references to the eight volumes of the record containing the reporters' transcript of the proceedings. All exhibit references will be to those filed in the "Montag" case.

QUESTIONS PRESENTED

In light of the record filed here and the opinion below, respondents do not believe that petitioners' statement of the questions presented is sufficiently precise. We believe the following is an accurate statement of the only questions raised which have any foundation in the record:

1. Whether work stoppages arising out of a demand by a union that an employer assign to its members part of a particular work task already assigned to members of a second union will support a judgment for damages under Sections 303(a)(4) and 303(b), Labor Management Relations Act, 1947, 29 U.S.C. §§ 187(a)(4) and 187(b), in respect of any period after the international presidents of the two unions have tentatively agreed that part of the work may be reassigned to members of the first union if it will not reduce the man hours of employment of members of the second union.

2. Whether a contract providing for arbitration of jurisdictional disputes between unions authorizes the arbitrator to divide a single work assignment between two unions in a manner which requires duplicate crews to perform a single work assignment.

STATEMENT OF THE CASE

The petition for a writ of certiorari is misleading as to the facts of this case because of certain important omissions. The material facts are accurately summarized in the opinion of the Court of Appeals for the Ninth Circuit, which is printed as Appendix A to the petition and reported at 335 F.2d 216. Additional facts will be cited hereinafter where necessary to a complete understanding of the issues.

At the outset, however, we wish to correct one misleading, although perhaps immaterial, implication in the petition. On page 6 petitioners couple a recital of testimony that respondents "had bid the job based on rigging the job by the use of Iron Workers" with a charge that in making the assignment respondents "disregarded" the Carpenters' submission of overwhelming evidence indicating they were entitled to the work. The intended implication of this statement, as indicated by the argument which follows, appears to be that respondents acted arbitrarily and in bad faith because they could do the work more cheaply with ironworkers than with carpenters.

There is no support in the record for such an implication. The uncontradicted evidence was that actually the work which was assigned to ironworkers could have been done more cheaply with carpenters because of lower wage scales (Tr. 885, 886). The testimony cited by petitioners concerning the manner of computing the bid (Tr. 151) had no relation to *which union* should per-

form the rigging work but was given as a reason why respondents could not afford to hire *duplicate* rigging crews. Furthermore, there was no issue in the case as to the good faith of respondents in making the assignment or as to its propriety. The parties stipulated and the court found that in assigning the work respondents proceeded in accordance with their construction of the "procedural rules and regulations of the National Joint Board for Settlement of Jurisdictional Disputes, Building and Construction Industry" (MR 29, par. 8; MR 57, par. 8; Exhibit 26). This respondents were required to do by their contract with both unions. Although petitioners disputed the assignment (MR 58, par. 9), this was not important as to *respondents'* good faith because the union's responsibility provisions of the Procedural Rules forbade work stoppages and required the unions to remain at work and comply with the employer's assignment pending resolution of the dispute by the Joint Board (Exhibit 3, pp. 5-6, pars. 1, 2, 3 and 4).

ARGUMENT

I

The record here presents no new or important question involving the appropriate interpretation of section 303(a)(4), Labor Management Relations Act, 1947, but only a question of fact decided below adversely to petitioners' contentions.

An examination of the record filed here demonstrates that on two separate occasions the petitioners induced and encouraged the employees of respondents to engage in concerted refusals, in the course of their employment,

to work on materials with the object of forcing respondents to assign particular work to members of Carpenters' Local 1849 rather than to members of the Ironworkers' Union to whom respondents had previously assigned such work (MR 30, pars. 10, 11 and 12; MR 58-59, pars. 10, 11 and 12; MR. 60, par. 16). Such conduct is in clear violation of the plain language of Section 303(a)(4), Labor Management Relations Act, 1947.

However, petitioners argue that the plain language of Section 303(a)(4) should be ignored and that that section should be construed to apply only to a situation where there is an active and continuing dispute between two competing unions over which is entitled to perform certain work which an employer has assigned to one of them. They argue that no such dispute existed in this case, at least at the time of the September work stoppage.

Even if the facts here were that no such dispute existed, the issue which would thereby be raised was decided adversely to petitioners' contention in *International Longshoremen's Union, Etc.* v. *Juneau Spruce Corp.*, 342 U.S. 237, 72 S. Ct. 235 (1952), where this Court said (342 U.S. at p. 244):

> "The fact that the union of mill employees temporarily acceded to the claim of the outside group did not withdraw the dispute from the category of jurisdictional disputes condemned by § 303(a)(4)."

In the same case this Court also pointed to the fallacy of petitioners' argument that the rights granted to parties under Sections 303(a)(4) and 303(b) should be

measured by the administrative remedies available under the unfair labor practice provisions of Sections 8(b)(4)(D) and 10(k), National Labor Relations Act, 29 U.S.C. §§ 158(b)(4)(D) and 160(k). This Court decided in *Juneau Spruce* and reaffirmed in *NLRB* v. *Radio & Television Broadcast Engineers Union*, 364 U.S. 573, 81 S. Ct. 330 (1961), that these sections present two distinct approaches to the problem of handling jurisdictional disputes and that no substantive symmetry between them is required.

Accordingly, although we agree with petitioners' statement on page 13 of the petition that the conduct proscribed by Sections 303(a)(4) and 8(b)(4)(D) is identical, we cannot agree with the conclusion which follows. The fact that a dispute proscribed by Section 8(b)(4)(D) is adjusted or resolved in the manner contemplated by Section 10(k), prior to the imposition of normal unfair labor practice sanctions, does not mean that such conduct is *ipso facto* removed from the type proscribed by Section 8(b)(4)(D). On the contrary, it merely means that the parties have effectively availed themselves of the remedy afforded by Section 10(k), a remedy which is entirely distinct from that afforded by Section 303(b).

In any event, even if it were deemed desirable to reconsider the question resolved by this Court in the above cases, this is not a proper case in which to do so because that issue here is wholly hypothetical. The court below decided this case on the basis of respondents' alternative argument that there was in fact an

active and continuing dispute of the type which petitioners assert is necessary. The uncontradicted evidence supports this conclusion in two particulars:

1. The evidence showed nothing more than a tentative agreement between the presidents of the two international unions conditional upon finding a way to give the work to the carpenters without taking it away from the ironworkers; and

2. Whatever the agreement of the presidents or representatives of the two international unions, there was never an agreement at the local level.

The undisputed evidence shows that the dispute was not settled at the time of or during the initial work stoppage in June (Exhibits 29, 31, 37; Exhibit 7, pp. 27-28). The record does not support petitioners' statement on page 7 of the petition that the evidence is in conflict as to whether the ironworkers conceded every issue in dispute on June 20. The so-called general rigging work on multipurpose cranes which was the work involved in the dispute here was clearly not resolved at the meeting on June 20 (Exhibit 5, pp. 34-35; Exhibit 40, p. 2; Exhibit 7, p. 31). In fact, the undisputed evidence was that even after the tentative agreement of the international presidents on August 27, 1957, which is relied on by petitioners, the Ironworkers' International representative refused to meet to place the "understanding" in effect (Exhibit 5, pp. 38-39) and was accused of stalling and "holding out" (Exhibit 47). As late as September 10, 1957, the day the second work stoppage commenced, he was still "awaiting confirm-

ation of the understanding" (Exhibit 49). Furthermore, the members of Ironworkers' Local 14 continued to perform the work and their business representative denied the existence of an agreement (Exhibit 50).

As late as September 18, 1957, eight days after the second work stoppage had commenced, petitioners' international president acknowledged that the so-called agreement was only a tentative agreement dependent upon an "equitable solution" and the maintenance of the "status quo insofar as man hours are concerned" (Exhibit 53). The Ironworkers concurred in this interpretation (Exhibit 54). Even after the second work stoppage was concluded, the members of Ironworkers' Local 14 continued to perform the work and the international representatives continued to attempt to work out an "equitable solution" (Exhibit 7, p. 46). It was not until November 14, 1957, that the international unions finally reached a definite agreement (Exhibit 8, p. 16; Exhibit 7, p. 46; Exhibit 9, p. 23). But not even then did this settle the dispute insofar as it concerned the members of Ironworkers' Local 14, who continued to perform the work despite the threat of disciplinary action by their international president (Exhibit 8, pp. 19-20).

As stated above, the court below concluded, on the basis of the foregoing evidence, that an active and continuing dispute existed between petitioners and the ironworkers over the work of rigging forms on multipurpose cranes. The court also concluded that even if there had been a definite agreement between the two unions to divide respondents' single work assignment between them, with petitioners taking the wood forms and the

ironworkers the metal forms, this would not have removed the dispute from the category of a jurisdictional dispute. The court said:

> "And the fact that the union which has the job is not unwilling that the other union should come in and do some of the work and get paid for doing it, if the first union will still continue to get paid for the work, does not remove the situation from the category of jurisdictional disputes."

This conclusion is in accord with that of the National Labor Relations Board in similar situations arising under the unfair labor practice provisions of Sections 8(b)(4)(D) and 10(k), National Labor Relations Act. See, *Engineered Building Specialties, Inc.*, 144 NLRB No. 119 (1963); *Detroit Mailers Union No.* 4, 146 NLRB No. 23 (1964), and *Plumbers & Pipefitters Union (Bellezza)*, 149 NLRB No. 64 (1964).

It is, therefore, evident that the first point which petitioners seek to raise is not new, important or substantial and is, in fact, wholly hypothetical.

II

The Court below did not substitute its judgment for that of an arbitrator.

At the outset, we wish to point out that, in discussing their second point, petitioners again imply arbitrary action and bad faith by respondents in having assertedly "invoked the arbitral machinery of the Joint Board's procedures, but then refused to comply with that Board's award." Once again, to set the record straight on what may be an immaterial matter, what

respondents sought from the Board was to compel petitioners to comply with their contract that there would be no work stoppages due to jurisdictional strikes (Exhibits 28, 32 and 34). What petitioners describe as respondents' "refusal" to comply with the Board's order was, as shown by the evidence of both the union representatives and the employer, the inability after several months of effort to find any way to carry out the Joint Board's instructions that its award be executed in a manner not requiring duplicate crews (Tr. 888-892; Exhibit 5, pp. 54-56; Exhibit 7, pp. 39-41; Exhibit 9, p. 29). There was no contrary evidence except perhaps some vague hearsay testimony by deposition (Exhibit 9, pp. 56-57). Petitioners did not even attempt to prove that this could have been done and in fact the evidence of damages in support of their counterclaim assumed the necessity of duplicate crews. The refusal of the Ironworkers to have composite crews removed the only possible expedient by which the award could be complied with, without the necessity of duplicate crews (Exhibit 8, p. 8; Exhibit 11, p. 3; Exhibit 4, p. 8; Tr. 892).

Petitioners argue that when the court of appeals concluded that respondents had not breached the collective bargaining agreement with petitioners by failing to comply with the Joint Board award, it substituted its judgment for that of the Joint Board on a matter involving the merits of the dispute in disregard of this Court's decision in *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358 (1960). The decision in that case, however, supports the ruling below.

The Joint Board was founded for the express purpose of providing an orderly procedure for the processing and determination of jurisdictional disputes cognizable under Sections 8(b)(4)(D) and 303(a)(4), without work stoppages (Exhibit 3, p. 1; Exhibit 2, p. 5). The source of the Board's authority was the agreement of the parties that it should "consider and decide" any such disputes (Exhibit 2, p. 5, Sec. 3). The court of appeals acknowledged this fact when it held (335 F.2d at p. 223) that the parties had agreed to submit jurisdictional disputes to the Board only for the express purpose of having the dispute decided, not straddled. The scope of the submission agreement was, of course, a judicial question.

As the court pointed out, the Joint Board did not purport to decide which of two competing unions was entitled to the single work assignment of rigging on multipurpose cranes. Instead, the Board merely rubber stamped the agreement of the international unions to divide the work, with the proviso that this be done in a manner which would eliminate any possibility of duplicate crews or any accusation of featherbedding (Exhibit 9, pp. 38-39, 40-41, 43, 45). The net result was a self-contradictory award which was impossible of performance despite repeated efforts of all parties to comply with it. The Board's award was an attempt to divide the work between *both* unions and, therefore, exceeded its authority to *decide* the dispute. As mentioned above, the National Labor Relations Board has rejected the argument that jurisdictional disputes can be "decided" by the unions agreeing, over the protests of the employer,

to make two jobs out of one by dividing a single work assignment between them.

Respondents submit that the award here clearly exceeded the scope of the submission and the jurisdiction vested in the Board to decide jurisdictional disputes. Certainly, the court of appeals had not only the power but the duty to make this determination, as shown by this Court's decision in *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358 (1960), as follows:

> ". . . an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. . . . his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

Accordingly, the court below did not usurp the Board's jurisdiction to decide the merits of the dispute. It decided only that the Board's method of disposition did not constitute a settlement of the dispute as authorized by the submission agreement.

CONCLUSION

The petition for a writ of certiorari presents no new or important question as to the interpretation of a federal statute. The decision below is not contrary to this Court's previous cases or those of any other circuit or of the National Labor Relations Board. The unique factual situation is of interest only to the parties here and

certiorari should not be granted to give petitioners a further review of facts already passed on by two federal courts.

The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

MANLEY B. STRAYER,
1410 Yeon Building,
Portland, Oregon,
Counsel for Respondents.

ROBERT H. HUNTINGTON,
CHARLES J. MCMURCHIE,
1410 Yeon Building,
Portland, Oregon,
Of Counsel.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY MEMORANDUM

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,
Counsel for the Petitioners.

FRANCIS X. WARD,
WILLIAM A. McGOWAN,
101 Constitution Ave., N.W.,
Washington, D. C. 20001,

R. MAX ETTER,
706 Spokane & Eastern Bldg.,
Spokane, Wash. 99201,

Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY MEMORANDUM

The briefs filed by respondents Montag and Curtis in opposition to our petition cannot be permitted to pass unchallenged or unanswered.

First. Respondent Montag attacks the Joint Board's award, with which it consistently refused to comply, on the ground (Montag Br. 11) that it "was an attempt to divide the work between *both* unions and, therefore, exceeded its

authority to *decide* the dispute." This is simply another way of saying that Montag disliked the decision, for the reason that, elsewhere expressed (Montag Br. 11), "the [Joint] Board merely rubber stamped the agreement of the international unions to divide the work."

Now, obviously, a decision can go wholly one way, or wholly another, or else in between. After all, an arbitrator is not limited by the straitjacket of "either/or," and this one plainly—and properly—did not feel itself thus restricted. We submit that the principle that makes labor arbitration awards immune from judicial intermeddling is broad enough to support every arbitral award that espouses a middle course. For, as this Court also said in *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 598-599, reasoning in terms that fit this case like a glove:

> "The Court of Appeals' opinion refusing to enforce the reinstatement and partial back pay portions of the award was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction of it.
>
> "The collective bargaining agreement could have provided that if any of the employees were wrongfully discharged, the remedy would be reinstatement and back pay up to the date they were returned to work. Respondent's major argument seems to be that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not so provide, and that therefore the arbitrator's decision was not based upon the contract. The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. This underlines the fundamental error which we have alluded to in *United Steelworkers of America* v. *American Manufacturing Co.*, *ante*, p. 564, decided this day. As we there emphasized, the

> question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

Here the arbitrator—the Joint Board—construed the contract—the collective bargaining agreement containing the provisions for the Joint Board's arbitration—as permitting a decision that divided the work. Montag broke its contract providing (Ex. 3, p. 12) that "The affected Unions and Contractors shall promptly comply with each job decision of the Joint Board" when it refused to comply with the Joint Board's award on the footing that this body, its own chosen arbitrator, misconstrued the contract when so deciding. And the court below exceeded its competence when it held that Montag's non-compliance with the arbitrator's award was no breach of contract simply because the court's interpretation of that contract was different from the Joint Board's.

Second. The foregoing issue, involved in petitioners' counterclaim, concerns only Montag among the respondents (Pet. 3-4, 7-9, 10-11, 14-15). The other issue in respect of which review is being sought* concerns all the respondents—and on that other issue our adversaries part company. Montag and its associates say (Montag Op. 6) that they "agree with petitioners' statement on page 13 of the petition that the conduct proscribed by Sections 303(a)(4) and

---

* Pet. 2: "Whether work stoppages arising out of a demand by a union that an employer assign to its members particular work already assigned to members of another union will support a judgment for damages under §§ 303(a)(4) and (b) of the Labor Management Relations Act, 1947, in respect of any period after the two unions were no longer competing for the particular work but had agreed that it should be reassigned to members of the first union."

8(b)(4)(D) is identical," while Curtis (Curtis Op. 3) says that "the substantive meaning" of the two sections is different, relying on *Labor Board* v. *Radio Engineers*, 364 U.S. 573, 585. For reasons already adequately canvassed (Pet. 13), that case dealt with remedies rather than substance, in consequence of which Montag's concession as to identity of substantive content is plainly justified.

Thereafter, the two respondents converge once more, putting forward *International Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, 245, as dispositive of our contention that Section 8(b)(D)(4) is not violated when the two unions concerned are no longer competing for the particular work but had agreed on its assignment (Montag Op. 5; Curtis Op. 3-4). Significantly, neither respondent has seen fit to quote more than the same single sentence from the *Juneau* opinion.

What this Court actually said in *Juneau* shows that the present situation was not under consideration there. It said (342 U.S. at 244-245):

> "Here the jurisdictional row was between the outside union and the inside union. The fact that the union of mill employees temporarily acceded to the claim of the outside group did not withdraw the dispute from the category of jurisdictional disputes condemned by § 303(a)(4)."

Here, however, on petitioners' view of the present record, there was not a mere temporary accession by the Iron Workers, but a complete yielding by them to the Carpenters, so that there was no further "jurisdictional row."

Similarly, the court of appeals cases cited at Curtis Op. 3—*Vincent* v. *Steamfitters' Local*, 288 F. 2d 276, 278 (C.A. 2); *Local 978, United Brotherhood of Carpenters* v. *Markwell*, 305 F. 2d 38, 47 (C.A. 8)—did not deal with a situation where there is no conflict between two unions, while the Labor Board decisions predominate in petitioners' favor. Five Labor Board rulings, duly cited at Pet. 12,

hold that there is no jurisdictional dispute within the meaning of §§ 8(b)(4)(D) and 10(k) in the absence of conflicting claims between competing unions. Two more, relied on by Montag (Op. 9), seem to hold that agreement by the two unions is unavailing unless the employer joins therein. *Bricklayers & Masons Int'l Union, Local 3*, 144 NLRB 1279; *International Mailers Union*, 146 NLRB No. 23, 55 LRRM 1272, 1274. The third Labor Board case relied on by Montag, *Local 69, United Association &c. of the Plumbing and Pipefitting Industry*, 149 NLRB No. 64, decided November 13, 1964, does not bear on the present point either way.

Significantly, the court below did not accept Montag's contention that the statutory provision must be construed literally (Pet. App. A4-A5; Montag Op. 5). The question is a recurring one, no judicial decision other than the one sought to be reviewed has come to grips with it, and the numerical weight of authority of Labor Board rulings is counter to what was decided below.

Third. This is not a situation where petitioners are urging this Court to overturn a factual determination made at the trial on conflicting evidence, far less one where there are concurrent findings by two courts. Here the findings by the trier of facts (MR 53-61, 68-72; HR 22-28; CR 24-29) shed no light whatever on the issue contested at the trial that was and remains critical: When and to what extent did the Carpenters and the Iron Workers resolve their differences concerning the assignment of the initially contested "rigging" work?

We are not asking that this Court resolve the evidentiary conflicts in the present record (though we must note that Curtis Op. 5, quoting from *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 454, has drawn entirely on the dissenting opinion in that case).

All we urge is that the Court rule whether, after there is no longer any competition between rival unions for par-

ticular work, after both are in agreement regarding its assignment, the employer can none the less obtain a judgment for damages under § 303(a)(4). If that issue—a pure question of law—is decided in accord with our view, and in accord with the numerical weight of the Labor Board authorities, these consolidated causes may then appropriately be remanded to the district court for detailed findings of fact regarding the time, the scope, and indeed the very nature of the agreement reached by the Carpenters and the Iron Workers here.

CONCLUSION

For the foregoing additional reasons, it is respectfully submitted that this petition for certiorari should be granted.

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,
Counsel for the Petitioners.

FRANCIS X. WARD,
WILLIAM A. MCGOWAN,
101 Constitution Ave., N.W.,
Washington, D. C. 20001,

R. MAX ETTER,
706 Spokane & Eastern Bldg.,
Spokane, Wash. 99201,

Of Counsel

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